Supreme Court, U.S.
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No. 92-1415

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

DAVID BAIRD, et al.,

Petitioners,

v.

CONSOLIDATED CITY OF INDIANAPOLIS, et al.,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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April 16, 1993

QUESTION PRESENTED

This is an action brought under Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973, challenging a geographically overlapping, 25 single and four at-large member, municipal redistricting ordinance for the Marion County, Indiana City-County Council (the "Council Plan") that provides African-Americans concededly greater than proportional representation on the Council as a whole from the single-member seats. The question presented is:

Whether the inclusion of four at-large seats in the Council Plan violates Section 2's requirement that minority voters have an equal opportunity "to participate in the political process and to elect representatives of their choice," where the Council Plan, when viewed as a whole and under the "totality of the circumstances," affords African-American voters in Marion County assured greater than proportional representation on the Council.

LIST OF PARTIES

Petitioners have correctly identified all of the parties to the proceeding in the court below at the time proceedings before that court were initiated. However, following the November 5, 1991 general elections, Stephen Goldsmith was elected Mayor of the City of Indianapolis and the following individuals were elected under the Council Plan to four-year terms on the City-County Council (the "Council"):

Linda E. Beadling
Elwood Black
Philip C. Borst
Rozelle Boyd
Maggie M. Brents
David E. Brooks
Beulah Coughenour
Carlton E. Curry
William A. Dowden
Ron V. Franklin
Kenneth N. Giffin
Gordon G. Gilmer
Jeffrey L. Golc
Phillip D. Hinkle
Glenn L. Howard
Z. Mae Jimison
Paul H. Jones
Mary Bridget Moriarity
Timothy M. Mullin
Cory E. O'Dell
Stuart W. Rhodes
Betty Ruhmkorff
William G. Schneider
Beurt SerVaas
Randy J. Shambaugh
Frank T. Short
David Smith
Stephen R. West
Susan Williams

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents, the Consolidated City of Indianapolis, *et al.*, pursuant to Rule 15, Rules of the United States Supreme Court, hereby oppose the petition for a writ of certiorari seeking review of the decision of the United States Court of Appeals for the Seventh Circuit in this case. *Baird v. Consol. City of Indianapolis*, 976 F.2d 357 (7th Cir. 1992).

STATEMENT OF THE CASE

The Council, which is the consolidated legislative body for both the City of Indianapolis and Marion County, Indiana, by state statute is comprised of 29 members, 25 of whom are elected from single-member districts and four of whom are elected at-large from the whole county. Res. App. at 6a (Ind. Code § 36-3-4-2(a)); Pet. App. at A62 (Ind. Code § 36-3-4-3(b)). The four at-large members do not occupy a unique position on the Council relative to the members elected from the 25 single-member districts. Pet. App. at A17. The four at-large members are elected by the same voters who elect the members from the 25 single-member districts, and the candidates receiving the most votes from either the whole county (at-large seats only) or their individual districts (single-member seats only) are elected to the Council for four-year terms. Res. App. at 7a (Ind. Code § 36-3-4-2(f)); Pet. App. at A62 (Ind. Code § 36-3-4-3(c)).

Petitioners correctly note that, by way of an October 26, 1989 amended complaint, they added claims that General Ordinance No. 128 (1982) (the "1982 Ordinance") as a whole, and in particular the at-large election of four Council members, violated Section 2. Pet. App. at A23. At that time, the Council had seven African-American members, five elected from single-member districts and two elected at-large. Res. App. at 21a - 28a. However, as a result of a September 14, 1990 status conference and in the interests of judicial economy (given the imminent availability of the 1990 census data), the parties entered into and the district court, on September 25, 1990, approved a Joint Stipulation and Consent Decree (the "Joint Stipulation"). Pet. App. at A44-A49. Pursuant to the Joint Stipulation, the Petitioners agreed to dismiss the claims contained in their original and amended complaints, and the Respondents, in turn, agreed to redraw the Council districts based on the 1990 census data a year earlier than required by

state statute and to conduct the 1991 Council elections using the new districts. *Id.* In addition, the Joint Stipulation afforded the Petitioners the opportunity to challenge the new districting scheme only by filing a new amended complaint. *Id.* [1]

The resulting Council Plan, adopted at a March 25, 1991 public meeting, retained, as required by state law, the 25 single-member seats (albeit with new boundaries that created seven single-member districts in which African-Americans constituted 60% population majorities) as well as the four members of the Council to be elected at-large from the entire county. Pet. App. at A1-A2, A24, A32. Based on 1990 census data (African-Americans are 21.3% of the total population and 19.3% of the voting-age population in Marion County), proportional representation on the Council would afford African-Americans the equivalent of 6.17 Council seats out of 29. However, the seven African-American majority districts created under the Council Plan constitute 24.1% of a 29-member Council, which is in excess of the percentage of African-Americans in both the total (21.3%) and voting-age (19.3%) populations in Marion County. Pet. App. at A12, A32.[2]

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[1] Significantly, and contrary to the unsupported claims of the Petitioners, *see* Pet. Cert. at 3, 26 & n.12, the redistricting accomplished pursuant to the Joint Stipulation was in no sense "remedial" or in "partial compliance" with the Joint Stipulation by retaining the at-large seats. Respondents did not admit in the Joint Stipulation, and have never admitted, any violation of the Voting Rights Act or the United States Constitution. There has never been a trial on the merits, and no court has made any finding that either the 1982 Ordinance or the Council Plan violates the Voting Rights Act or the Constitution. Pet. App. at A44-A49. Moreover, the Joint Stipulation did not require the abolishment of the four at-large seats, and the district court noted in its February 25, 1991 Pretrial Entry and Order that, absent the filing of a new amended complaint, its review of the Council Plan would be limited to whether Respondents had fully complied with the procedures set out in the Joint Stipulation. Res. App. at 9a.

[2] Indeed, as the district court noted, Petitioners and their own expert admitted that the Council Plan afforded African-Americans in Marion County assured, future, proportional representation on the Council from the seven seats. Pet. App. at A12, A14-A15, A17, A20, A36 & n.2.

On April 2, 1991, the newly-constituted Plaintiffs, Petitioners herein, began the second stage of this litigation by filing a new amended complaint requesting a preliminary injunction against implementation of the Council Plan solely on the ground that the retention of the four at-large seats in the Council Plan violated Section 2. Res. App. at 15a-20a. Significantly, Petitioners specifically admitted that the 25 single-member districts in the Council Plan met "the minimal requirements of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, by creating seven (7) majority black districts, both the maximum and minimum number of black majority districts which can be created in a twenty-five (25) seat plan using the 1990 census data . . . ." *Id.* at 16a (Amended Complaint at ¶ 6). Moreover, Petitioners specifically alleged that African-Americans in Marion County vote as a bloc for candidates of the Democratic party. *Id.* at 17a (Amended Complaint at ¶ 11).

Following an evidentiary hearing on April 17, 1991, the district court, on April 25, 1991, denied Petitioners' motion for a preliminary injunction, holding in part that Petitioners had not shown a likelihood of success on the merits because "the proportional representation of African-Americans on the Council satisfies the Section 2 requirement that they have equal access to the political process." Pet. App. at A43. Thereafter, on October 23, 1991, the district court granted Respondents' Motion for Summary Judgment, again ruling that the at-large seats could not be challenged in isolation from the 25 single-member seats, and that, as a matter of law, "where the plaintiffs concede that the current ordinance will provide for proportional representation, they cannot establish a simultaneous violation of Section 2." Pet. App. at A17.[3]

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[3] Contrary to Petitioners' unfounded misrepresentations to this Court, *see* Pet. at 7-13, 19, there were no disputed material facts before the district court or the Seventh Circuit, and none presently before this Court on appeal.

(continued on next page)

In the November 5, 1991 general election held under the Council Plan, the seven African-American majority districts produced seven African-American candidates of choice, and one African-American was elected to an at-large seat. Pet. App. at A2, A8. Following the elections, Petitioners, on November 21, 1991, appealed the district court's determination that the Council Plan, under the totality of the circumstances, satisfied the requirements of Section 2. On September 30, 1992, the court of appeals affirmed the district court's entry of summary judgment holding that the four at-large seats could not be challenged in isolation from the seven single-member seats, Pet. App. at A5-A6, and that Section 2 had not been violated because the conceded proportional representation of African-Americans on the Council gave them "an undiminished right to participate in the political process." Pet. App. at A3, A8.[4]

(continued from previous page)

Petitioners did not file with the district court any "affidavits or other documentary material controverting the movant's position," nor a "concise 'statement of genuine issues' setting forth all material facts as to which it is contended there is a genuine issue necessary to be litigated" as required by then Rule 11, General Rules of the United States District Court for the Southern District of Indiana. Res. App. at 5a. Nor did Petitioners dispute in their Memorandum in Opposition to Respondents' Motion for Summary Judgment any of the facts relied upon by Respondents in support of summary judgment. Indeed, the district court's October 23, 1991 Entry specifically noted that no genuine issues of material fact exist. Pet. App. at A12. This Court must, as did the lower courts, disregard all of the evidence cited by Petitioners in support of their argument that issues of fact exist.

[4] Petitioners make a number of "misstatements of fact and law" in their petition. As required by Rule 15.1, Respondents address these misstatements on pages 1a to 4a of their Appendix to the extent those misstatements are not directly addressed in the brief itself.

REASONS FOR DENYING THE WRIT

This Court should deny the petition for a writ of certiorari for two reasons. First, the court of appeals' decision is one of first impression which does not create a conflict with any decisions from either this Court or any other circuit court of appeals. Second, the decisions of the court of appeals and the district court are correct under Section 2 and its legislative history, fail to present issues warranting review by this Court that are either novel or of a manifest national importance, and occur in a unique factual context that makes this case a particularly unsuitable vehicle for providing future guidance to the lower courts and distinguishes it from the sole Section 2 case still pending on the merits before the Court. Indeed, as the court of appeals noted, Petitioners' claim is nothing more than the tired old argument uniformly rejected by this and other courts that the at-large seats in the Council Plan are *per se* unlawful under the totality of the circumstances. Pet. App. at A8.

I.
THE DECISION OF THE COURT OF APPEALS IS NOT IN CONFLICT WITH ANY DECISIONS OF THIS COURT OR OTHER CIRCUIT COURTS APPLYING SECTION 2

Petitioners assert that the court of appeals' decision conflicts with this Court's decision in *Thornburg v. Gingles*, 478 U.S. 30 (1986) and other court of appeals decisions. However, no such conflicts exist. The court of appeals' decision is entirely consistent with *Gingles* and this Court's recent decisions in *Growe v. Emison*, __ U.S. __, 113 S. Ct. 1075 (1993) and *Voinovich v. Quilter*, __ U.S. __, 113 S. Ct. 1149 (1993) and well-settled Section 2 case law in the circuit courts.

1. First, the court of appeals' decision does not conflict with *Gingles* or other circuit court decisions (on the ground that it refused to apply a "district-specific" analysis that examines the four at-large seats in isolation from the single-member seats) in light of the geographic overlap that exists in the Council Plan between the single-member and at-large seats. *See* Pet. at 6-7, 18-19.

Both the court of appeals, Pet. App. at A5, and the district court, Pet. App. at A13, A36-A39, specifically noted the fact of the "overlapping single- and multi-member districts," Pet. App. at A5, and the importance of this fact to their conclusions. Both courts correctly found that *Gingles* was inapposite because "[r]eferences in *Gingles* to district-specific inquiries assume that each multi-member district spans a different part of the state, with different minority populations and, perhaps, different cohesiveness of majority and minority voters." Pet. App. at A5. *See also* Pet. App. at A13, A37-A38 (district court opinion). *Compare Gingles*, 478 U.S. at 101 (O'Connor, J., concurring) (expressing the concern not present here that election data from some multi-member districts where minority voters do elect candidates of choice not be used to forever deny minority voters in other geographically separate multi-member districts the opportunity to elect candidates of choice).

The court of appeals' analysis is completely consistent with the totality of the circumstances approach required by Section 2, as well as *Gingles*, *Board of Estimate v. Morris*, 489 U.S. 688 (1989), and this Court's recent decision in *Voinovich*. Section 2 expressly requires an analysis of "the totality of the circumstances," 42 U.S.C. § 1973(b), and the legislative history of Section 2 reveals that Congress intended for a discriminatory result to be shown "in the context of all the circumstances of the jurisdiction in question." S. Rep. No. 417, 96th Cong., 2d Sess., *reprinted in* 1982 U.S. Code Cong. & Ad. News 177, 205. *Gingles* specifically approved this approach, 478 U.S. at 46, as did this Court recently in *Voinovich*. *See id.*, 113 S. Ct.

at 1157 ("plaintiffs can prevail on a dilution claim only if they show that, under the totality of the circumstances, the State's apportionment scheme has the effect of diminishing or abridging the voting strength of the protected class"). Finally, as both lower courts noted, the court of appeals' approach is consistent with *Morris* which held, in a Fourteenth Amendment context, that:

> Here the voters in each borough vote for the at-large members as well as their borough president, and they are also represented by those members. Hence in determining whether there is substantially equal voting power and representation, the citywide members are a major component in this calculation and should not be ignored.

Id., 489 U.S. at 701 (footnote omitted).

Moreover, Petitioners have pointed to no other analogous decisions, and Respondents are not aware of any, which have held that a court should examine the at-large seats in isolation from the single-member seats where the two geographically overlap and the at-large members do not occupy a unique position on the Council.[5] Neither *Collins v. City of Norfolk*, 883 F.2d 1232 (4th Cir. 1989) *cert. denied*, 498 U.S. 938 (1990), Pet. at 18, nor *Republican Party of North Carolina v. Martin*, 980 F.2d 943 (4th Cir. 1992), Pet. at 19, involved such a situation. There is thus no conflict meriting review by this Court.

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[5] Contrary to Petitioners' veiled efforts to suggest that the at-large councilors somehow possess special powers that other councilors do not, *see* Pet. at 20 & n.11, the district court specifically found that the at-large members "do not occupy a unique position on the Council." Pet. App. at A17.

2. Second, the court of appeals' decision, properly understood, does not conflict with *Gingles* or any other circuit court decisions by concluding that, notwithstanding the existence of evidence satisfying both the *Gingles* three preconditions for relief as well as several Senate Report factors, summary judgment is proper in a Section 2 case where, under the "totality of the circumstances," minorities in the overall jurisdiction have equal access to the political process because of assured, prospective proportionality on the legislative body under challenge.

First, Petitioners' argument that the court of appeals (1) denied them an opportunity to create a full record and (2) improperly elevated their burden of proof, *see* Pet. Cert. at 7, 8-9, 17, 18, 20-21, 22, 24-25, grossly misconstrues the court of appeals' decision.[6] The court of appeals specifically assumed that Petitioners could meet the *Gingles* three preconditions, Pet. App. at A3, and then concluded merely that "§ 2(b) also implies that blacks who have influence proportional to their numbers do not state a claim under § 2(a) . . . . Unless voters fare poorly compared with white voters in achieving their objectives (the election of candidates they prefer), they have not stated a claim *under § 2(b).*" *Id.* at A6 (emphasis in original). The district court reached exactly the same conclusion. *See* Pet. App. at A12, A15, A17, A43. Thus, far from raising Petitioners' burden of proof under *Gingles, see id.* at A4 ("we agree with [Petitioners] that proportional representation does not automatically defeat claims" under Section 2), the court of appeals' decision merely concluded that, even assuming full proof at trial of the *Gingles* preconditions and one or more Senate factors, the assured, future, proportional representation which was guaran-

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[6] Petitioners' repeated claims that the lower court merely inquired as to whether there was "current racial proportionality" on the Council, *see, e.g.*, Pet. Cert. at 18, 19, 21, are supported by no citation to any portion of its decision and, as will be explained, misstates the lower court's approach.

teed African-American voters under the Council Plan precluded, as a matter of law, a finding that, under the totality of the circumstances, they had an unequal opportunity "to participate in the political process and to elect representatives of their choice." *See id.* at A3 ("Proof along these lines [the *Gingles* preconditions] is not enough, however, if other considerations show that the minority has an undiminished right to participate in the political process"). Indeed, the court of appeals specifically noted that "the Voting Rights Act neither sets nor tolerates a cap on their [African-American voters'] achievements." *Id.* at A4.

As such, the court of appeals' decision is entirely consistent with *Gingles* where a majority of the court specifically held that, notwithstanding proof of the *Gingles* preconditions and numerous Senate factors, *see id.*, 478 U.S. at 37-41, 52-54 & n.23, 59-61 & nn.28, 29, "persistent proportional representation is inconsistent with . . . [an] allegation that the ability of black voters in District 23 to elect representatives of their choice is not equal to that enjoyed by the white majority." *Id.* at 77. *See also id.* at 82 (White, J., concurring); *id.* at 102-04 (O'Connor, J., joined by Burger, C.J., and Powell & Rehnquist, J.J., concurring in judgment). Moreover, because it adds no additional elements to Petitioners' proof, the court of appeals' decision likewise does not conflict in this respect with any of the other cases referred to by Petitioners. *See* Pet. at 22, 24-25 (*citing Vallalodid v. City of National City*, 976 F.2d 1293 (9th Cir. 1992); *Concerned Citizens of Hardee County v. Hardee County Bd. of Comrs.*, 906 F.2d 524 (11th Cir. 1990)).

Second, there is no conflict concerning the court of appeals' conclusion that it could rely upon the assured, prospective, proportional representation of African-Americans on the Council in entering summary judgment against Petitioners. *See* Pet. at 7, 19, 21, 22-23. In *Gingles*, the Court required a showing of *sustained, historical*, proportional representation only because of its fear that, in a pure at-large context, white voters could

much more easily manipulate the electoral process to produce an African-American representative who was not necessarily the candidate of choice of African-American voters. *See id.* at 76 n.37.[7] In this case, by contrast, no such fears are present given that African-Americans will, in the future, control their own destiny in these seven, 60%, African-American, majority, single-member districts:

> If these voters are politically cohesive, they will elect candidates of choice and obtain representation in the Council exceeding their numbers in the electorate; and if they are not cohesive, they cannot satisfy the requirements for relief under *Gingles*.

Pet. App. at A4. *See also id.* at A7 ("Plaintiffs acknowledge that black voters are no longer 'packed' and will control the outcome in 7 of the 25 districts so long as they remain cohesive"); *id.* at A14-A15 (district court opinion).[8] This case is entirely consistent with numerous other Section 2 cases which have rejected Section 2 challenges to similar "mixed" redistricting schemes where prospective proportional representation exists in the legislative body as a whole from single-member districts. *See, e.g., Latino Political Action Committee, Inc. v. City of Boston,* 609 F. Supp. 739 (D. Mass 1985), *aff'd,* 784 F.2d 409 (1st Cir.

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[7] Moreover, in *Davis v. Bandemer,* 478 U.S. 109 (1986), this Court held that "*[p]rojected* election results based on district boundaries and past voting patterns may certainly support this type of claim [political discrimination], even where *no* election has yet been held under the challenged districting." *Id.* at 139 n.17 (emphasis in original).

[8] Even so, historical proportional representation did exist under the Council Plan's predecessor, the 1982 Ordinance, in that the 1987 councilmanic elections produced seven African-American members of the Council. *See* Res. App. at 21a-28a.

1986); *Warren v. City of Tampa*, 693 F. Supp. 1051 (M.D. Fla. 1988), *aff'd without opinion*, 893 F.2d 347 (11th Cir. 1989). No conflict meriting review thus exists.

3. Third, the court of appeals' reference to the role of "partisan politics" in Marion County elections does not merit review by this Court because it does not conflict with the Fifth Circuit's decision in *League of United Latin American Citizens v. Clements*, __ F.2d __, 1993 WL 14413 (5th Cir., January 27, 1993), is unsupported by the record below, and, even if improper, would not change the result in this case. Pet. at 14-17.

Contrary to Petitioners' selective and misleading characterization of *Clements*, *see* Pet. at 14-17, it presents no conflict with this case given the agreement of both the majority and the dissent in *Clements* that this case, *Baird*, was properly decided even under the *Clements* majority's vote dilution standard and its reading of *Whitcomb v. Chavis*, 403 U.S. 124 (1970). In footnote 55 of its opinion, the *Clements* majority thoroughly distinguished this case:

> Texas does not elect its district court judges from single member districts, and the minority groups in the various counties, even if they were 100% politically cohesive, would not be guaranteed the opportunity to elect representatives even approaching their numbers in the community. Thus, our conclusion about the significance of partisan voting patterns in this case says little about the significance of partisan voting—or interest group politics—under other circumstances. We are not suggesting that, in a situation like *Baird*, where a minority group was guaranteed through subdistricting the opportunity to elect representatives of its choice roughly in proportion to its population in the community, the minority group's failure to achieve proportional representation—due to interest group poli-

> tics—would support a vote dilution claim. In such a case, members of the minority group would simply be unable to demonstrate, in the words of Section 2, that they had "less opportunity . . . to participate in the political process and to elect representatives of their choice." In the context of a case like *Baird*, we would agree with Judge Easterbrook's statement that "[t]he Voting Rights Act does not guarantee that nominees of the Democratic Party will be elected, even if black voters are likely to favor that party's candidates." 976 F.2d at 361.

Id. at *5 n.55. *See also id.* at *24 (Higgenbotham, J., dissenting). The *Clements* court correctly read the court of appeals' conclusions regarding the role of "partisan politics" as limited to its particular undisputed facts—that the at-large seats do not, under the totality of the circumstances, have the effect of denying African-Americans an equal opportunity to elect candidates of their choice to the Council.[9] The court of appeals' discussion of the role of "partisan politics" in Marion County elections is entirely consistent with this Court's recent unanimous pronouncement in *Voinovich* that:

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[9] Petitioners' belated attempts to inject a claim based on either partisan or racial intent to discriminate, *see* Pet. Cert. at 15, 17, 21, must be disregarded because no such claim was pled in their April 2, 1991 Amended Complaint, Res. App. at 15a-20a, and because no such evidence or claims were properly designated to the district court during the summary judgment briefings. *See supra* at 4-5 n.3. Moreover, their claim that the retention of the at-large seats somehow conflicts with *Whitfield v. Democratic Party of State of Arkansas*, 890 F.2d 1423 (8th Cir. 1989), *aff'd en banc*, 902 F.2d 15 (1990), *cert. den.*, 111 S. Ct. 1089 (1990), in that the Council's retention purposefully intended to cancel out the increased black voting strength in the single-member seats, Pet. at 23-24, is again unsupported by any evidence in the record.

> Section 2 contains no *per se* prohibitions against particular types of districts: It says nothing about majority-minority districts, districts dominated by certain political parties, or even districts based entirely on partisan political concerns. . . . Only if the apportionment scheme has the effect of denying a protected class the equal opportunity to elect its candidate of choice does it violate § 2; where such an effect has not been demonstrated, § 2 simply does not speak to the matter.

Id., 113 S. Ct. at 1156.

Moreover, far from constituting the court of appeals' holding in this case, its discussion of the role of "partisan politics" in Marion County, which was completely supported by the record,[10] was merely "illustrative" of the fact that politics may and do play a large role in Marion County elections and would not have changed the result in this case even if in error. Pet. App. at A7. Consistent with *Voinovich*, the court of appeals' only point was that: "The Voting Rights Act does not guarantee that nominees of the Democratic Party will be elected, even if black voters are likely to favor that party's candidates." Pet. App. at A8. The discussion in no way affects or alters the court of appeals' ultimate conclusion that Petitioners failed to prove a Section 2 claim as a matter of law where assured, proportional

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[10] Contrary to Petitioners' assertions, *see* Pet. at 14-15, they themselves specifically admitted in their April 2, 1991 Amended Complaint that Marion County African-Americans vote as a bloc for candidates of the Democratic party, Res. App. at 17a, and the Seventh Circuit relied upon actual election results from the November, 1991 elections that were made a part of the record on appeal in drawing its conclusions concerning political voting patterns in Marion County. *See* Pet. App. at A7.

representation on the Council as a whole provides African-Americans in Marion County with equal access to the political process and thus merits no review by this Court.

4. Finally, the court of appeals' decision does not conflict with *Gingles* (in that it erroneously "overvalues" purportedly "court-ordered remedial efforts" to attain proportionality on the Council, Pet. at 26) because Petitioners misconstrue *Gingles* and again conveniently misstate the record in this case.

While Petitioners properly note *Gingles'* acknowledgement that a court "could take account of the circumstances surrounding recent black electoral success in deciding its significance," *id.*, 478 U.S. at 76, they omit that the discussion occurred in the context of a challenge to pure at-large elections where the white majority could more easily manipulate the electoral outcome. Indeed, the *Gingles* Court went on to note that a court:

> could properly consider to what extent "the pendency of this very litigation [might have] worked a one-time advantage for black candidates in the form of unusual organized political support by white leaders concerned to forestall single-member districting" . . . where multimember districting generally works to dilute the minority vote on the ground that it sporadically and serendipitously benefits minority voters.

Id. (citations omitted). *See also id.* at 76 n.37 (quoting from *Zimmer v. McKeithen*, 485 F.2d 1297, 1307 (5th Cir. 1973) *(en banc), aff'd sub nom., East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976) (*per curiam*)). However, as the court of appeals repeatedly noted, this case, by contrast, presents no such conflict with *Gingles*, given the admitted fact that African-Americans will control their own destiny in the seven single-member districts where they are 60% population majori-

ties. *See* Pet. App. at A4, A7; *see also id.* at A14-A15 ("here the plaintiffs have conceded that the current redistricting scheme will provide seven black majority seats on the Council").

In addition, Petitioners' argument on this score severely misstates the record. As already pointed out, *see supra* at 2-3 & n.1, the Joint Stipulation in this case in no way resembles a typical "consent decree" in that there was no admission or finding by the district court that the 1982 Ordinance or any prior redistricting plan violated Section 2. The Respondents neither promised nor were required under the Joint Stipulation to eliminate the at-large seats, and there is no evidence in the record that the instant lawsuit in any way "caused" the resulting Council Plan. The present case is not in any way a court-ordered redistricting following the finding of a Section 2 violation, but is rather a court-approved method for utilizing imminently available 1990 census figures for redistricting that was otherwise soon to occur under state statutory requirements. The district court itself rejected the Petitioners' argument that the redistricting undertaken pursuant to the Joint Stipulation was in any sense "remedial." Pet. App. at A15.[11] There thus is no conflict concerning the reliance placed by the court of appeals on the Council's 1991 redistricting plan.

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[11] Petitioners' assertion, Pet. at 26 n.12, that the district court "appears" to have followed the procedure outlined in *Scott v. Germano*, 381 U.S. 407 (1965), to let the Council first attempt to correct Section 2 "violations" but that it failed to prefer the elimination of the at-large seats in a "court-approved plan" likewise is completely unfounded. The Joint Stipulation was solely the product of voluntary agreement between the parties and authorized the district court to "approve" the resulting plan only to the extent that it determined that the Council followed the procedures set out in the Joint Stipulation no matter what plan it chose. *See* Res. App. at 9a. The court's substantive review of the Council Plan occurred only upon the filing of a new Amended Complaint.

II.
THE NOVEL DECISION OF THE COURT OF APPEALS WAS CORRECT, PRESENTS NO ISSUES OF MANIFEST NATIONAL IMPORTANCE, AND PRESENTS AN UNSUITABLE VEHICLE FOR PROVIDING GUIDANCE UNDER SECTION 2

As Petitioners aptly note at the beginning of their petition, *see* Pet. at 7, "[t]his is a case of first impression" that was properly resolved by the lower courts, and which, given its unique facts, neither presents issues of manifest national importance warranting review by this Court nor an appropriate vehicle for the Court to provide the lower courts with future guidance as to the meaning of Section 2.

The novelty of this case is perhaps best illustrated by Petitioners' omission of *any* factually analogous case presenting similar claims, much less one that presents a real conflict concerning the scope or application of Section 2 or Rule 56 of the Federal Rules of Civil Procedure in a Section 2 case. As already pointed out, the court of appeals' decision, which held only that a Section 2 claim ultimately could not be proven where the totality of the circumstances revealed that Marion County African-Americans had an undiminished equal opportunity to participate in the political process, is entirely consistent with Rule 56, Section 2 and its legislative history, the *Gingles* methodology, and other decided Section 2 cases.

Moreover, this case likewise presents no issues of manifest national importance concerning the meaning or operation of Section 2, but rather, as the court of appeals realized, Pet. App. at A8, involves nothing more than the oft-rejected claim that the at-large seats in the Council Plan are *per se* unlawful. *See Gingles*, 478 U.S. at 46. Finally, this case involves a rarely encountered challenge to at-large seats which form part of a geographically overlapping "mixed" representation system affording minorities proportional representation out of conced-

edly lawful single-member districts. As such, it is not a vehicle to provide any meaningful guidance concerning the operation of Section 2 in the vast majority of cases involving pure at-large challenges.

III.
THE DECISION OF THE COURT OF APPEALS SHOULD NOT BE HELD PENDING A DECISION ON THE MERITS IN *WETHERELL v. DeGRANDY*, NO. 92-519

Finally, while this Court does, in certain circumstances, hold cases until the Court reaches a decision in a pending case raising identical or similar issues, *see, e.g., Keney v. New York*, 388 U.S. 440 (1967), no such action is warranted here given that *Wetherell v. DeGrandy*, No. 92-519, the only Section 2 case presently awaiting a decision on the merits in this Court, raises no identical or similar issues, the resolution of which would have a bearing on the outcome in this case.

Petitioners here have conceded that the Council Plan affords African-Americans in Marion County, the challenged geographic jurisdiction, greater than proportional representation on the Council as a whole from single-member districts that *geographically overlap* the countywide at-large seats. *See supra* at 2. As such, Petitioners' arguments in this case as to the legality of the at-large seats amount to nothing more than a claim that courts must, under Section 2, *maximize* African-American voting strength *beyond* admitted proportional representation in the entire jurisdiction under challenge wherever population and housing patterns would permit the drawing of additional African-American majority districts.

In *Wetherell*, by contrast, the parties merely dispute what type of minimum proportional representation showing is required under *Gingles* to provide a sufficient defense to the vote dilution claims of *geographically distinct* minorities in a statewide reapportionment plan. *See* U.S. Mot. at 11-14. Neither party

in *Wetherell* has suggested that Section 2 requires that a reapportionment plan provide anything more than proportional representation in the overall geographic jurisdiction under challenge, nor that a reapportionment plan must maximize minority voting strength to survive a Section 2 challenge. *See* Appellants' Brief in Opp. at 3 ("there is no dispute that statewide proportionality satisfies Section 2 as a matter of law").

As such, this Court's resolution of the dispute in *Wetherell* concerning the type of minimum proportionality showing required as a defense to a statewide vote dilution challenge would not affect the court of appeals' rejection of Petitioners' maximization claims in this case based upon the admitted, countywide future proportionality that exists in the overall jurisdiction under challenge. Indeed, this Court recently summarily affirmed on the merits a three-judge, district court decision *rejecting* a maximization claim beyond undisputed future proportionality in the jurisdiction under challenge. *See African-American Voting Rights Legal Defense Fund, Inc. v. Blunt,* No. 92-1249, 61 U.S.L.W. 3678 (U.S. April 5, 1993), *aff'g*, 797 F. Supp. 1488 (W.D. Mo. 1992).

Thus, because the result in this case would not be affected by this Court's eventual resolution of the issues raised in *Wetherell* and is, in fact, entirely consistent with its recent summary affirmance in *Blunt,* the Court should immediately deny the petition for certiorari in this case. Such a result properly affords deference to the lawful redistricting choices represented by the Council Plan and allows the present councilors elected under the Council Plan to move forward without the further shadow that this Section 2 litigation represents to their legitimacy as the candidates of choice of Marion County voters.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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April 16, 1993

APPENDIX

RULE 15.1 MISSTATEMENTS

As required by Rule 15.1, Rules of the Supreme Court of the United States, Respondents address those "perceived misstatements of fact or law set forth in the petition which have a bearing on the question of what issues would properly be before the Court if certiorari were granted" that have not otherwise been addressed in their brief.

1. Petitioners' assertion that *Bryant v. Whitcomb*, 419 F. Supp. 1290 (S.D. Ind. 1970) establishes that "Indianapolis and Indiana first used the at-large election district to intentionally discriminate against ethnic Germans in 1849," Pet. at 3 n.2, finds no support in that decision and is unsupported by any evidence of record in this case.

2. Petitioners' assertions that the 1991 redistricting that followed the September 25, 1990 Joint Stipulation was somehow "remedial and in partial compliance" with the Joint Stipulation, Pet. at 3, 26-27, is not supported by the record.

3. Petitioners have failed to include a page 64 to their Appendix in support of their assertion that "[t]he only governmental justification presented by the Respondents for the at-large district was that it assured the mayor's political party control of the council (A64)." Pet. at 4.

4. Petitioners' assertions that Respondents' Motion for Summary Judgment argued that the districts created by the 1991 redistricting "might" result in racial proportionality on the Council and merely that the retention of the at-large seats did not *per se* dilute minority vote in Marion County, Pet. at 4-5, misrepresents the arguments presented in that motion. Respondents claimed in that motion that *conceded, future proportionality* precluded the finding of a Section 2 violation and that this conceded, future proportional representation rendered Petitioners' Section 2 claim as to the at-large seats merely one that they were *per se* unlawful under the totality of the circumstances. In addition, the district court did not specifically incorporate its

"proportionality analysis from its April 25, 1991 entry," Pet. at 5, but rather merely incorporated the entire April 25, 1991 Entry because it based the grant of summary judgment on Petitioners' failure to offer any new arguments or evidence to convince the court that the two premises underlying its earlier April 25, 1991 Entry were in error. *See* Pet. App. at A12, A13, A14.

5. Petitioners' assertions that the lower courts' allowance of summary judgment in the face of proof of the *Gingles* three preconditions and one or more Senate factors improperly denied them "full consideration" of their claims and the opportunity to develop a full record concerning matters such as the "impact of white crossover voting and the motivation behind the adoption and retention of the at-larges," *see* Pet. at 7, 8-9, 14, 15, 17, 18, are misguided. It ignores the fact that Respondents moved for summary judgment based on the "totality of the circumstances" and that Rule 56 imposes upon the non-moving party, in this case Petitioners, the obligation to come forward *at the time of its response to the summary judgment motion* with all disputed issues of material fact and the evidence to be marshalled in support of its claims. To stand idly by and later complain that the lower court denied them an opportunity to create a full record subverts the purpose of Rule 56 and severely prejudices Respondents.

6. Petitioners' apparent assertion that a slating fee is charged *only* for the at-large seats, Pet. at 11, ¶ 6, misrepresents Councilor Boyd's Affidavit, which only references a slating fee for *all* seats on the Council. *See* Pet. App. at A56, ¶ 37.

7. Petitioners' reference to supposed "racial appeals" in the 1992 campaign for attorney general, Pet. at 12 n.9, must be disregarded because it was not a part of the record below.

8. Petitioners wrongly attribute the statement that "Prior *de jure*, and *de facto*, racial discrimination, meant that 'African-Americans did not have an equal opportunity to express their interests, and that the prejudicial attitude of white citizens

would permit things to continue without change,'" Pet. at 13, ¶ 13, to the district court. No such statement appears in the district court opinion on the claimed page (Pet. App. at A42) or anywhere else.

9. Petitioners' assertions that there is no evidence in the record as to why African-Americans vote the way they do, Pet. at 14-15, is belied by actual election results in the record and by their own April 2, 1991 Amended Complaint which specifically alleges that Marion County African-Americans vote as a bloc for candidates of the Democratic party. *See* Res. App. at 17a.

10. Contrary to Petitioners' assertions, the lower courts found that no *genuine* issues of material fact exist, *see* Pet. App. at A12, not that "there was no substantial issue of material fact." Pet. at 14.

11. Petitioners' inclusion of the chart summarizing 1971-1987 elections under the Council, Pet. at 19, must be disregarded because it was not properly a part of the record below.

12. Petitioners' assertion that the lower court misinterpreted the proviso in 42 U.S.C. § 1973(b) which rejects a right to proportional representation to mean that the Voting Rights Act forbids the removal of barriers to election if, *by removing* the barrier, minority voters would gain the ability to elect greater than proportional candidates of choice, Pet. at 21, misconstrues the Respondents' position, the facts of this case, and the court of appeals' holding. Respondents have merely argued, and the court of appeals so held, that while Section 2 places no cap on minority representation, it does not require the removal of an election practice or procedure as long as the minority population has equal access (proportional or greater than proportional representation) *without the removal* of the practice or procedure. Of course, if discriminatory intent with regard to the inclusion or retention of the practice or procedure could be shown (which is not the case here), Section 2 might independently be violated.

13. Petitioners' assertion that the lower court's method for calculating "racial proportionality" improperly "slants" that calculation in favor of white voters when it determines the number of "black seats" by counting only black population and the number of "white seats" by counting only white population regardless of whether the individual voted in favor of a black or white "candidate of choice," Pet. at 21, is dead wrong. This obviously conservative method, assuming it was used, actually favors African-Americans because, while it supposedly counts white cross-over voters as supportive of white "candidates of choice," it nevertheless leaves them free to coalition build and perhaps elect additional African-American candidates of choice.

14. Petitioners incorrectly attribute the statement in *Gingles* that "'proportional or nearly proportional representation in a single election . . . alone precludes, as a matter of law, finding a Section 2 violation'" to Justice O'Connor, Pet. at 22, when, in fact, the statement was made by Justice Brennan, *see Gingles*, 478 U.S. at 75, and omit that the position was rejected strictly in the context of proportionality resulting from a pure at-large context, precisely the opposite of the situation here.

RULE 11, GENERAL RULES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA

In addition to a separate supporting brief as required by Rule 9 of these Rules, there shall be served and filed with each motion for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure, a statement of material facts as to which the moving party contends there is no genuine issue, proposed conclusions of law, and a proposed summary judgment. Any party opposing the motion shall, within fifteen (15) days from the date such motion is served upon him, serve and file any affidavits or other documentary material controverting the movant's position, together with an answer brief and concise "statement of genuine issues" setting forth all material facts as to which it is contended there exists a genuine issue necessary to be litigated.

In determining the motion for summary judgment, the court will assume that the facts as claimed by the moving party are admitted to exist without controversy, except as and to the extent that such facts are actually in good faith controverted in the "statement of genuine issues" filed in opposition to the motion, as supported by the depositions, answers to interrogatories, admissions, and affidavits on file.

All motions for summary judgment shall be considered as submitted for ruling without oral argument unless the court otherwise directs.

36-3-4-2 City-county council; membership; election; eligibility; vacancy; term of office

Sec. 2. (a) A twenty-nine (29) member city-county council, which is the legislative body of both the consolidated city and the county, shall be elected under IC 3-10-6 by the voters of the county.

(b) To be eligible to serve as a member of the legislative body, a person must meet the qualifications prescribed by IC 3-8-1-25.

(c) A member of the legislative body must reside within:

(1) the county as provided in Article 6, Section 6 of the Constitution of the State of Indiana; and

(2) the district from which the member was elected, if applicable.

(d) A vacancy in the legislative body occurs whenever a member:

(1) dies, resigns, or is removed from office;

(2) ceases to be a resident of the county or district from which the member was elected; or

(3) is incapacitated to the extent that the member is unable to perform the member's duties for more than six (6) months.

(e) The vacancy shall be filled under IC 3-13-8.

(f) The term of office of a member of the legislative body is four (4) years, beginning at noon on January 1 after election and continuing until a successor is elected and qualified. *As added by Acts 1980, P.L. 212, SEC. 2. Amended by P.L. 5-1986, SEC. 40; P.L. 3-1987, SEC. 552.*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JUNE MURRAY, et al.,	)
	)
Plaintiffs,	)
	)
v.	)CAUSE NO. IP 87-111-C
	)
THE CONSOLIDATED CITY OF INDIANAPOLIS, et al.,	)
	)
Defendants.	)

PRETRIAL ENTRY AND ORDER

A pretrial conference in this matter was held on February 19, 1991 before the Honorable Sarah Evans Barker, Judge of the United States District Court, Southern District of Indiana. The Plaintiffs, June Murray, et al. ("Plaintiffs") were represented by Stephen Laudig and William R. Groth. The Defendants, The Consolidated City of Indianapolis, et al. ("Defendants") were represented by Kristie L. Hill, Margo Barber, and Wayne C. Ponader. Robert G. Elrod, the attorney for the Indianapolis-Marion County City-County Council (the "Council") was also present.

After reviewing the status of the matter with counsel, the Court entered the following orders:

1. *Procedure for Approval of Defendants' Redistricting Ordinance*. Paragraph 18 of the "Joint Stipulation and Consent Decree" ("Joint Stipulation") executed by the parties and approved by the Court on September 25, 1990, provides

that with respect to the Defendants' redistricting ordinance ". . . it shall be submitted to this Court for review and approval after a public hearing." The procedure with respect to the foregoing shall be as follows:

A. The Defendants shall file with the Court their proposed redistricting ordinance (the "Ordinance").

B. If Plaintiffs object to Defendants' Ordinance:

(i) Plaintiffs shall file an amended complaint, together with any alternative plan(s).

(ii) Defendants shall respond to Plaintiffs' amended complaint and alternative plan(s).

(iii) The hearing before the Court shall be as upon a request for a preliminary injunction under Section 2 of the Voting Rights Act.

C. If Plaintiffs do not file an amended complaint:

(i) The hearing before the Court shall be confined to whether or not there was compliance with the procedures set out in the Joint Stipulation.

2. *Adoption by Council of Ordinance Incorporating Plan Prior to Court Hearing.* Notwithstanding anything to the contrary contained in the Joint Stipulation including paragraph 18 thereof, the Council shall adopt any Council redistricting ordinance or ordinance abolishing or changing the manner of voting for the four (4) at-large seats on the Council prior to submitting such ordinance to the Court for review and approval as contemplated under the terms of paragraph 18 of the Joint Stipulation.

3. *Public Hearing Requirement.* The provision of paragraph 12 of the Joint Stipulation which requires that: "The Council will hold at least two (2) public hearings . . ." with respect to any proposed redistricting ordinance may be satisfied by having such hearings before the Rules and Public Policy Committee of the Council or any other permanent committee of the Council just as hearings would be held with respect to any other ordinance to be adopted by the Council.

4. *Schedule.* The Court hereby adopts the following schedule:

Date	*Action*
March 27, 1991	Proposed redistricting ordinance of Council to be submitted to Court.
April 3, 1991	Plaintiffs (if they object to the proposed redistricting ordinance) to file amended complaint with the Court, together with any proposed redistricting and at-large ordinances (if any).
April 10, 1991	Defendants to submit any answer and/or reply to Amended Complaint and proposals of Plaintiffs.
April 12, 1991	Parties to exchange witness lists, exhibit lists, and any stipulations of facts and documents.
	Defendants and Plaintiffs to advise Court as to whether or not there is a necessity for an additional pretrial prior to the trial.

April 17, 1991 10:00 a.m.	Trial/hearing before the Court. Trial briefs to be filed with the Court and exchanged between the parties prior to trial. The Court explicitly advises the parties that there will be no post-hearing briefs accepted by the Court from either party.
May 7, 1991	Primary date for all elective offices in Marion County, Indiana, as required by statute, except for the Council.
June 25, 1991	Postponed date for primary election for members of the Council, only.

5. *Indiana Statutes Which are Superseded.* The following Indiana statutes, to the extent that they conflict with this Order or the Joint Stipulation as amended by this Order are hereby superseded:

A. I.C. 36-3-4-3 which provides that the Council shall redistrict in 1992. This statute is superseded for the purpose of permitting a redistricting in 1991 and also for the purpose of not requiring a further redistricting in 1992.

B. I.C. 3-11-1.5-32 which provides that Council districts cannot be changed between November 8 of the year preceding a municipal election and the day after election.

C. I.C. 1-1-3.5 which provides that the census shall not become "effective" until 1992. This statute is superseded for the purposes of the redistricting by the Council contemplated under the terms of the Joint Stipulation and this Order and for purposes of the Court's decision at the trial provided by this Order. For purposes of the procedures under the Joint Stipula-

tion and this Order and the Court's decision under this Order, the census data which has been received to date by the Defendants as reported by the Defendants to the Court in their "Notice of Receipt of 1990 U.S. Census Data" filed herein on February 11, 1991, shall be deemed the official census upon which the Defendants may rely in accomplishing the redistricting contemplated. Plaintiffs reserve the right to request a modification of any redistricting plan based upon any adjustment to the census count by the Secretary of Commerce.

D. I.C. 3-10-1-3 which sets the date of the primary for the Council.

E. The attorneys for the parties also discussed whether or not it was necessary or appropriate to modify the Indiana statutes which set out residency requirements for councilmen as such statute applies to incumbent councilmen. The Court made no ruling in this regard and instructed the parties to confer to determine if a mutually acceptable decision could be reached and advise the Court.

6. *Primacy of this Order*. To the extent that any provision of the Joint Stipulation may be in conflict with any provision or term of this Order, the terms of this Order shall govern.

APPROVED AS TO FORM:

CITY-COUNTY LEGAL DIVISION
KRISTIE L. HILL
CORPORATION COUNSEL

By/s/Margo Barber
Margo Barber
Assistant Corporation
Counsel

/s/Stephen Laudig
Stephen Laudig

/s/Wayne C. Ponader
Wayne C. Ponader

/s/William R. Groth
William R. Groth

Attorneys for Defendants,
The Consolidated City
of Indianapolis, et al.

Attorneys for Plaintiffs,
June Murray, et al.

APPROVED AND MADE AN ORDER OF THIS COURT.

Dated: February 25, 1991

/s/Sarah Evans Barker
SARAH EVANS BARKER,
JUDGE
United States District Court
Southern District of Indiana

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JUNE MURRAY, et al.,	)	
	)	
Plaintiffs,	)	
v.	)	CAUSE NO. IP 87-111-C
	)	
THE CONSOLIDATED CITY OF INDIANAPOLIS, et al.,	)	
	)	
	)	
Defendants.	)	

AMENDED COMPLAINT

Plaintiffs, David Baird, Rozelle Boyd, William D. Crawford, Glenn Howard, and Paul Jones, for their Amended Complaint against the Defendants pursuant to the Court's Pre-Trial Entry dated February 25, 1991, allege as follows:

1. Plaintiffs, who are each African-American citizens residing in Marion County, by way of this Amended Complaint seek declaratory and injunctive relief to enforce the provisions of Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. §1973.

2. The jurisdiction of this Court is invoked under 28 U.S.C. §§1331, 1343(3), 1343(4) and 2201, this suit being authorized by 42 U.S.C. §1973j(f).

3. On September 25, 1990 this Court approved a Joint Stipulation and Consent Decree between Plaintiffs and Defendants, paragraph 23 of which permits Plaintiffs to challenge the failure to abolish the four (4) at-large seats by way of an amended complaint.

4. On February 4, 1991 defendant Marion County City-County Council ("Council") ratified and adopted the recommendation of the Council's Rules and Policy Committee, made following a public hearing held on January 24, 1991, to retain without change the four (4) at-large Council seats and the manner of voting for those four (4) at-large seats.

5. By its Pre-Trial Entry and Order dated February 25, 1991 the Court ordered that Plaintiffs by April 3, 1991 file an amended complaint should they object to the redistricting and/or at-large ordinances, and scheduled a hearing on April 17, 1991 on any such objections.

6. Defendants have complied with procedures set forth in the Consent Decree with respect to public hearings and on March 25, 1991 enacted a twenty-five (25) seat redistricting ordinance which meets the minimal requirements of Section 2 of the Voting Rights Act, 42 U.S.C. §1973, by creating seven (7) majority black districts, both the maximum and minimum number of black majority districts which can be created in a twenty-five (25) seat redistricting plan using the 1990 census data without packing African-American voters into too few districts or dispersing them among too many districts.

7. At-large elections for four (4) seats on the Council have been held in Marion County since the adoption of Uni-Gov by the Indiana General Assembly in 1969.

8. In the past five (5) elections (1971, 1975, 1979, 1983, 1987) four (4) members of the Council have been elected at-large from the whole of Marion County pursuant to a series of ordinances adopted by the Council under the authority vested in it by I.C. 36-3-4-3.

9. According to the 1990 census, there exists in Marion County a sizeable and significant black population consisting of more than 21% of the total population of Marion County, most of which is concentrated in Center, Wayne, Pike, Washington, Lawrence and Warren Townships.

10. The effect of electing four (4) Council seats at-large is to dilute and give proportionately less representation and influence in the Council to Plaintiffs and other African-American voters who reside in Marion County.

11. Plaintiffs and other African-American voters in Marion County are politically cohesive and vote as a bloc for candidates of the Democratic Party.

12. No candidate of choice of African-American voters has ever been elected to an at-large seat on the Council in any of the five (5) elections (1971, 1975, 1979, 1983, 1987) held under the present at-large electoral structure.

13. Plaintiffs and other African-American voters have been, and will continue to be, unable to elect their preferred candidates to any at-large seat on the Council because the white majority in Marion County votes sufficiently as a bloc to enable it to defeat the preferred candidates of Marion County African-Americans.

14. Voting in Marion County is racially polarized in that African-American voters and white voters prefer different candidates with a high degree of frequency and the white voting majority in Marion County is powerful enough to consistently defeat the preferred candidates of Marion County African-Americans running for the four (4) at-large Council seats.

15. Because of the Council's decision on February 4, 1991 to perpetuate the four (4) at-large seats and not to change the manner of voting for those four (4) at-large seats, and because

the at-large electoral structure dilutes the votes of African-Americans who reside in Marion County, Plaintiffs and other Marion County African-American voters will continue to have less opportunity to participate in the electoral process and to elect at-large representatives of their own choosing.

16. The Indiana statute and Marion County ordinance providing for the election at-large of four (4) seats in the Council contain no subdistrict residency requirements.

17. There is a long history of official discrimination in the State of Indiana and Marion County that touches on the right of Plaintiffs and other black citizens to register, to vote, or otherwise to participate in the democratic process.

18. Black citizens in Marion County bear the effects of discrimination in education, housing, employment and health, which hinder their ability to participate effectively in the political process, as demonstrated by the fact that:

(a) Housing patterns are segregated by race throughout Marion County.

(b) Black unemployment in Marion County is higher than white unemployment.

(c) A greater percentage of blacks than whites residing in Marion County have incomes below the federally-recognized poverty line.

(d) The per capita income of blacks residing in Marion County is lower than that of whites.

(e) Marion County has had, until recently, the highest black infant mortality rate among major cities in the United States and still has among the highest black infant mortality rates.

19. The vote dilution effects of electing four (4) Council seats at-large are exacerbated by the economic disparities between African-American and white citizens of Marion County, particularly in view of the far greater costs of cam-

paigning for office county-wide as compared to in a single-member district only one twenty-fifth (1/25) the size of the county.

20. The election at-large of four (4) Council seats results in the dilution of the votes of African-American voters residing in Marion County and substantially impairs and diminishes their ability to elect candidates of their choice to any of the four (4) at-large seats on the Council, in violation of Section 2 of the Voting Rights Act, 42 U.S.C. §1973.

21. There is no legitimate public policy reason supporting the election at-large of four (4) members of the Council.

22. The next primary election in Marion County is scheduled to be held on May 7, 1991.

WHEREFORE, Plaintiffs respectfully pray that this Court:

(1) Enter a declaratory judgment that the election at-large of four (4) Council seats violates the Voting Rights Act of 1965, as amended, 42 U.S.C. §1973, and preliminarily and permanently enjoin the defendants from holding any further elections at-large for Council members under the present method of selecting at-large Council members, including the 1991 primary election; and

(2) Award Plaintiffs their attorney fees, costs and expenses of this action, together with any other relief as the Court deems necessary to do justice.

Respectfully submitted,

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Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document has been served, via first class mail, postage prepaid upon:

Wayne C. Ponader
Bose, McKinney & Evans
Suite 2700
135 North Pennsylvania Street
Indianapolis, Indiana 46204

Kristie Hill
Margo Barber
City Legal
Room 1601, City-County Bldg.
Indianapolis, Indiana 46204

on this 2nd day of April, 1991.

/s/William R. Groth

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JUNE MURRAY, et al.,	)	
	)	
Plaintiffs,	)	
v.	)	CAUSE NO. IP 87-111-C
	)	
THE CONSOLIDATED CITY OF INDIANAPOLIS, et al.,	)	
	)	
	)	
Defendants.	)	

AFFIDAVIT OF BEVERLY RIPPY-DICK

STATE OF INDIANA	)	
	)	SS:
COUNTY OF MARION	)	

BEVERLY RIPPY-DICK, (hereinafter "Affiant") being first duly sworn upon her oath deposes as says as follows:

1. Affiant is the Clerk of the Indianapolis City-County Council (the "Council").

2. Affiant as such Clerk is well and truly familiar with the records of such Council.

3. Attached hereto as Exhibit A and made a part hereof is a list of the current City-County Councilors by district, also indicating the party of each such councilor and the race of each such councilor.

4. In connection with the redistricting of the Council accomplished by the councilors the Council solicited from all interested persons proposed redistricting plans for the Council

based on the 1990 census. The Council received nineteen (19) plans. Attached as Exhibit B and made a part hereof is a compilation of such plans indicating the author of each such plan, the number of councilmanic districts into which the author had divided the county, the districts that each such plan had with African-American population of fifty to sixty-four percent (50-64%) as well as the districts that each such plan had with African-American population of sixty-five percent (65%) or greater. Such compilation also indicates certain instances in which no actual map was submitted.

5. Attached hereto as Exhibit C is a table indicating for each current councilor, the number of the district in which he is currently serving, and the number of his new district.

FURTHER, THE AFFIANT SAITH NOT.

/s/Beverly Rippy-Dick
Beverly Rippy-Dick

Subscribed and sworn to me a Notary Public for said County and State this 11th day of April, 1991.

/s/Cathy L. Long
Notary Public

My commission expires: 12/17/92
My county of residence: Marion

CURRENT CITY-COUNTY COUNCILORS

NAME	PARTY	RACE	DISTRICT
Gordon Gilmer	R	W	1
Beurt SerVaas	R	W	2
William Schneider	R	W	3
William Dowden	R	W	4
John Solenberg	R	W	5
Stephen West	R	W	6
Stuart Rhodes	R	W	7
Holley Holmes	R	W	8
Glenn Howard	D	B	9
Paul Jones	D	B	10
Rozelle Boyd	D	B	11
Betty Ruhmkorff	R	W	12
Richard Clark	R	W	13
Cory O'Dell	R	W	14
Mary Moriarty	D	W	15
Harold Hawkins	D	B	16
Jeff Golc	D	W	17
Dwight Cottingham	R	W	18
Kenneth Giffin	R	W	19
David McGrath	R	W	20
Ray Irvin	R	W	21
Susan Williams	D	W	22
Diana Strader	R	B	23
Beulah Coughenour	R	W	24
Philip Borst	R	W	25
David Brooks	R	W	AL
Carlton Curry	R	W	AL
Beverly Mukes-Gaither	R	B	AL
Julius Shaw	R	B	AL

Exhibit A

AUTHOR OF PLAN	# DISTRICTS	# DISTRICTS WITH AFRICAN-AMERICAN POPULATION 50-64%	#DISTRICTS WITH AFRICAN-AMERICAN POPULATION 65% OR GREATER
Tom Kenworthy	25	3	2
Larry Holderly	25	5	0
as amended	25	6	0
Robert White	29	1	3
Thomas Mowle	29	7	0
Martha Martin	1	0	0
Kevin O'Neal	25	5	0
Channing Myers	29	0	3
Barry Levitt	25	4	0

Exhibit B

AUTHOR OF PLAN	# DISTRICTS	# DISTRICTS WITH AFRICAN-AMERICAN POPULATION 50-64%	#DISTRICTS WITH AFRICAN-AMERICAN POPULATION 65% OR GREATER
Stephen Laudig	25	7	0
as revised	25	7	0
Ralph Horn	25	0	4
Eric Cheatam	25	0	3
Ivan Hampton	29	2	2
as revised	29	2	2
Andrea Toonder	29	1	2
John Lucid	29	1	3
Thomas Moynahan	25	1	3

Exhibit B (continued)

AUTHOR OF PLAN	# DISTRICTS	# DISTRICTS WITH AFRICAN-AMERICAN POPULATION 50-64%	#DISTRICTS WITH AFRICAN-AMERICAN POPULATION 65% OR GREATER
Raymond Baker	25	2	1
Steven West	25	7	0
as revised	25	7	0
as revised	25	7	0
Carol Kirk	No actual map submitted		
Norman Primus	No actual map submitted		

Exhibit B (continued)

CURRENT CITY-COUNTY COUNCILORS

INCUMBENT'S NAME	OLD DISTRICT NUMBER	NEW DISTRICT NUMBER
Gordon Gilmer	1	1
Beurt SerVaas	2	2
William Schneider	3	3
William Dowden	4	4
John Solenberg	5	5
Stephen West	6	6
Stuart Rhodes	7	7
Holley Holmes	8	8
Glenn Howard	9	9
Paul Jones	10	10
Rozelle Boyd	11	11
Betty Ruhmkorff	12	12
Richard Clark	13	13*
Cory O'Dell	14	13*

Exhibit C

INCUMBENT'S NAME	OLD DISTRICT NUMBER	NEW DISTRICT NUMBER
Mary Moriarty	15	15*
Harold Hawkins	16	16*(not running in 1991)
Jeff Golc	17	17
Dwight Cottingham	18	18
Kenneth Giffin	19	19
David McGrath	20	20
Ray Irvin	21	16*(not running in 1991)
Susan Williams	22	22
Diana Strader	23	21*(not running in 1991)
Beulah Coughenour	24	24
Philip Borst	25	25
David Brooks	AL	(1)
Carlton Curry	AL	(18)
Beverly Mukes-Gaither	AL	(14)
Julius Shaw	AL	(22)

* Indicates more than one incumbent in the district

Exhibit C (continued)